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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ELIOT SCOTT GRIZZLE.

Petitioner,

C 07-4845 SI (PR)

OPPOSITION TO MOTION FOR DISCOVERY

ROBERT HOREL, Warden,

respondent.

[No Hearing Scheduled]

California state prisoner Eliot Scott Grizzle (“Grizzle”) has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 & 2254. This Court has not ordered respondent to show cause on the petition; respondent has not heretofore entered an appearance. Grizzle has nonetheless moved this Court for an order granting him extensive discovery. The motion is premature and, regardless, fails to establish good cause for the discovery. The motion should be denied.

ARGUMENT

Grizzle asks this Court for leave to conduct extensive discovery, including depositions and the production of documents. Stmt. of Facts and Memo. of P&A in Supp. of Pet.’s Motion (hereafter

1 “Motion”) at 2-3. The request should be rejected.

2 There is “no federal right, constitutional or otherwise, to discovery in habeas proceedings
 3 as a general matter.” *Campbell v. Blodgett*, 982 F.2d 1356, 1358 (9th Cir. 1993). Federal habeas
 4 discovery is available “if, and to the extent that, the judge in the exercise of his discretion and for
 5 good cause shown grants leave to do so, but not otherwise.” Rules Governing Section 2254 Cases,
 6 Rule 6. Good cause exists where “specific allegations before the court show reason to believe that
 7 the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to
 8 relief.” *Bracy v. Gramley*, 520 U.S. 899, 909-10 (1997).

9 Grizzle’s discovery request is premature. This Court has not yet conducted a preliminary
 10 review of the petition to determine what, if any, claims are viable and therefore require response by
 11 respondent; no order to show cause has issued. *See* Rules Governing Section 2254 Cases, Rule 4.
 12 The requirement is not simply procedural, as “good cause” for discovery can only lie relative to a
 13 viable claim. *See id.*, Rules 4 & 6; *Bracy v. Gramley*, 520 U.S. at 904, 909-10; *Rich v. Calderon*,
 14 187 F.3d 1064, 1068 (9th Cir. 1999); *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir.
 15 1990). The procedural legitimacy of the petition and its claims is likewise a prerequisite to
 16 evaluating whether good cause exists for discovery. *See, e.g., United States v. Roane*, 378 F.3d 382,
 17 403 (4th Cir. 2004) (discovery properly denied on procedurally defaulted claims); *Calderon v.*
 18 *District Court (Roberts)*, 113 F.3d 149 (9th Cir. 1997) (discovery inappropriate where the petition
 19 contains unexhausted claims). Not having been ordered to show cause on the petition, respondent
 20 has not had the opportunity to address the procedural viability of the petition or its claims, including
 21 questions of timeliness, exhaustion, and procedural default.

22 Even assuming, arguendo, Grizzle raises claims substantively and procedurally viable, his
 23 request for discovery remains premature. An evaluation of whether good cause exists for discovery
 24 should be made after briefing of the merits by the parties and production of the record, i.e., at least
 25 after an answer and traverse. *Cf.* Rules Governing Section 2254 Cases, Rule 6 Advisory Committee
 26 Notes (observing that “requests for discovery in habeas proceedings normally follow the granting
 27 of an evidentiary hearing,” although “there may be some instances in which discovery would be
 28 appropriate beforehand”). Only then can this Court determine whether discovery and the costs

1 associated with it are truly necessary to disposition of the petition. Indeed, the Supreme Court has
2 “made clear that whether a state court’s decision was unreasonable must be assessed in light of the
3 record the court had before it.” *Holland v. Jackson*, 542 U.S. 649, 652 (2004) (per curiam); *see also*
4 *Bell v. Cone*, 535 U.S. 685, 697 n.4 (2002) (declining to consider evidence not presented to the state
5 court). Whether the state court’s decision satisfies 28 U.S.C. § 2254(d) on the record that was before
6 that court should be determined on the parties’ merits briefs, before any question of discovery is
7 addressed.^{1/}

CONCLUSION

17 Accordingly, for the reasons stated, respondent respectfully requests that the motion for
18 discovery be denied.

25 1. Grizzle cannot rejoin that the requested discovery is necessary for the presentation of his
claims: He has already filed his petition, and cannot present new evidence for the first time in his
traverse.

26

27 2. A demonstrated effort to procure the requested materials in state court is relevant not only
to good cause for discovery, but also the question of exhaustion. *See Vasquez v. Hillery*, 474 U.S.
254, 257-58 (1986); *Smith v. Quarterman*, 515 F.3d 392, 403 (5th Cir. 2008).

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2 Respectfully submitted,

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